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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GREG FORAN et al.,	
Plaintiffs and Appellants,	G052075
v.	(Super. Ct. No. CIV MS 801064)
QUALITY REINFORCING, INC. et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from a judgment of the Superior Court of San Bernardino, Donna G. Garza, Judge. Affirmed.

Heiting and Irwin, Jean-Simon Serrano for Plaintiffs and Appellants.

Sabaitis Lunsford & Moore, Frank T. Sabaitis and David V. Moore for Defendant and Respondent Quality Reinforcing, Inc.

Marrone Robinson Frederick & Foster, J. Alan Frederick and Scot G. Sandoval for Defendant and Respondent Portola Constructors, Inc.

In this personal injury action, Greg Foran and his wife, Roberta Foran,[1] appeal from a final judgment entered after the trial court granted two summary judgment motions brought by Quality Reinforcing, Inc. (Quality) and Portola Constructors, Inc. (Portola). Greg and Roberta allege there exists triable issues of fact and the doctrine of res ipsa loquitur precludes the entry of summary judgment. We find their arguments lack merit and we affirm the judgment.

I

In March 2007 Greg was injured when he fell from the second floor of a construction project at the Twentynine Palms military base. Greg was working as foreman for the framing subcontractor, hired to build a two-story military barracks, referred to by the parties as the Bachelors Enlisted Quarters (BEQ).

On this job site the general contractor was RQ Construction, who hired several subcontractors. In addition to a framing subcontractor (Best Interiors) and masonry subcontractor (Frazier Masonry), there was a reinforcing steel subcontractor (Quality), and a steel decking subcontractor, Portola.

During a lunch break, Greg had to climb through a temporary perimeter safety railing built on the second floor before he could reach a ladder leading to the ground floor. The safety perimeter consisted of both horizontal and vertical rails. Greg's coworker, Frank Amaya, went down the ladder first without incident. As Greg descended the ladder, he placed his hand on one of the horizontal rails. The rail unexpectedly detached in his hand and this caused Greg to lose his balance and fall.

Greg filed a complaint alleging negligence, and his wife brought a claim for loss of consortium. The court granted Quality's and Portola's motions for summary judgment, which are the subject of this appeal. We will discuss each motion separately.

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[1] "We refer to the parties by their first names for purposes of clarity and not out of disrespect. [Citations.]" (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

A. Summary Judgment Standards

"Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A 'party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.' (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Once the moving party meets this initial burden, the burden then shifts to the party opposing summary judgment to establish, by means of competent and admissible evidence, that a triable issue of material fact still remains. [Citation.] [¶] 'An issue of fact can only be created by a conflict of evidence. It is not created by "speculation, conjecture, imagination or guess work." [Citation.] Further, an issue of fact is not raised by "cryptic, broadly phrased, and conclusory assertions" [citation], or mere possibilities [citation]. "Thus, while the court in determining a motion for summary judgment does not 'try' the case, the court is bound to consider the competency of the evidence presented." [Citation.]' [Citation.]" (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525-526 (*Brown*).)

"Our Supreme Court has explained how the burden of persuasion and/or production and the burden of proof are analyzed in motions for summary judgment. '[H]ow the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial. . . . Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would *require* a reasonable trier of fact to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment *as a matter of law*, but would have to present his evidence to a trier of fact. By contrast, if a defendant moves for summary judgment against such a plaintiff, he must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not—otherwise, *he* would not be entitled to judgment *as a matter of law*, but

would have to present *his* evidence to a trier of fact.' [Citation.]" (*Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Co., Inc.* (2004) 125 Cal.App.4th 152, 163.)

"On appeal, the reviewing court makes '"an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. [Citations.]"' [Citations.]" (*Brown, supra,* 171 Cal.App.4th at p. 526.) In reviewing such motions, "'[w]e accept as true the facts . . . in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them . . . .' [Citation.]" (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67.)

B. Portola's Motion for Summary Judgment

Greg's negligence action "requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached that duty, and that the breach was a proximate or legal cause of injuries suffered by the plaintiff. [Citation.]" (*Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1532.) Portola's summary judgment motion challenged the proof that it breached its duty or caused Greg's injury. Portola claimed Greg was injured by someone else's negligence on the job site.

Portola admitted it installed the vertical posts surrounding the ladder Greg was using when he fell. Its summary judgment motion was premised on two related theories. First, Portola asserted it did not install the horizontal *rebar* rail that detached in Greg's hand. Portola maintained it installed horizontal *cable* rails and, after it left the job site, the cable was replaced by rebar rails by a different subcontractor or the general contractor.

Second, Portola argued if there was a triable issue regarding whether Portola installed the rebar, there is no evidence its work caused the accident. Portola asserted the rebar railing detached because it was supposed to be attached to a vertical post, and there was no evidence Portola removed the vertical post. To the contrary,

Portola left the job site four weeks before the accident and its workmanship was inspected and signed off by the safety inspector and general contractor. It maintains the only reasonable inference that can be made from the evidence is that someone else removed the vertical post creating a dangerous condition.

We begin by reciting some of the undisputed facts contained in Portola's separate statement. On the day of the injury, Greg had been working on the second floor of the project. The only workers on the second floor that day were the framing and masonry subcontractors. When it was time for lunch, Greg and his crew planned to eat in their trailer and they needed to use a ladder to get to the ground floor. Greg and his crew did not use a ladder belonging to the framing subcontractor. Instead, they used a ladder belonging either to RQ Construction or the masons. The ladder had been red-tagged, and the parties disputed the reasons why it had been red-tagged. However, this dispute does not relate to a material fact regarding Portola's liability, and we need not discuss it further.

The parties agreed on the location of the ladder and the surrounding safety rail system with a few minor differences. In their depositions, Greg and Amaya stated the ladder was standing against a temporary perimeter safety rail made of rebar. They both remember the ladder was tied at the top to the safety rail system's vertical post. The safety rail system was made up of vertical steel posts that were approximately four feet high and were spaced three to four feet apart. Between the vertical steel posts were horizontal rebar safety rails. In his deposition, Greg recalled there were two horizontal rebar rails and he climbed between them to reach the ladder. He stated, "I went through the safety rail, I put one foot onto the ladder, crawled through the safety rail, put my other foot on the ladder. I was holding the safety rail [and] I straightened up to go down the ladder because I was crunched over from going through the rail. I straightened up and the safety rail broke off in my hand, and that's all I remember." He clarified he grabbed

the top rail with his right hand when it broke. He could not recall if the rebar rails went through the posts or were welded to the posts.

Similarly, Amaya stated he reached the ladder climbing through two pieces of rebar, going under one and over another. He could not recall if there was a third horizontal rail closer to the floor. He stated there was a code requirement that the top rail be attached four feet off the floor, but he could not remember how far off the ground it was that day. He estimated the two pieces of rebar were spaced 16 inches apart. He did not remember grabbing onto the railing to balance before using the ladder. Amaya believed he grabbed hold of the top of the ladder.

In his opposition, Greg disputed the facts relating to whether there were actually three horizontal rebar rails rather than two, and whether the rebar was spaced 21 inches apart rather than 16 inches. We conclude the dispute regarding the spacing and number of horizontal rebar rails is not relevant to the determination of Portola's liability because Greg does not claim the spacing or number of rails contributed to his fall.

Greg, weighing between 240 and 250 pounds, was not wearing a safety harness when he climbed between the horizontal pieces of rebar to access the ladder. When he placed his hand on the horizontal rebar rail, it broke in his hand, causing him to lose his balance and fall.

In his discovery responses prepared in May 2010, Greg asserted liability was based on the following: "Portola . . . may have put up the rebar/'safety rail.' They were working in the area where the safety rail and ladder were located. They may have controlled the ladder and put up the defective safety rail, causing or contributing to the fall. [¶] . . . [¶] . . . This added up to create a dangerous condition."

In its motion for summary judgment, filed in May 2013, Portola presented declarations, documentary evidence, and deposition transcripts to support its claim it did not install the horizontal rebar rail that detached in Greg's hand. The most telling piece

of evidence was Richard Seieroe's declaration. He was Portola's foreman during the BEQ construction project. His duties and responsibilities included installing, handling, and overseeing all aspects of the structural steel installation. Seieroe stated he was on the job site every day the crew was there, which was four days a week for approximately 10 hours a day.

Seieroe stated Portola was hired to fabricate and install the structural steel and metal decking for the second floor of the BEQ project. The Portola crew started work on Monday, February 5, 2007, through Thursday, February 15, 2007. They did not work on the job site for six weeks from February 15 to March 27, 2007. Greg's accident occurred approximately four weeks after Portola left the BEQ project.

Seieroe described how Portola installed the metal decking on the second floor, as follows: "[T]he metal decking was sorted on the job site and then forklifts and a crane were used to hoist the metal decking onto steel girders on the [second] floor of the BEQ. Once the metal decking was hoisted up . . . it needed to be shook out, cut and then the metal decking was welded to the steel girders. After the metal decking was installed, concrete was poured by other trades on top of the metal decking to finish creating the [second] story floor for the structure." While Portola's crew was working on the second floor, they installed two types of temporary fall protection systems. One was "a single temporary catenary cable rail system" that permitted the crew to use a harness and lanyard to tie off to the cable while the decking was being installed. This system is referred to as a "yo-yo." In Seieroe's deposition, he clarified a catenary line consisted of steel pickets welded with cable. The cable was a half-inch or three-eighths inch in size.

After the decking was installed, the crew set up the second fall protection system. Portola put in "a temporary two cable perimeter rail system at the perimeter of the [second] floor." This was accomplished by "stringing two parallel and horizontal cables between vertical posts/pickets."

Seieroe explained that because the BEQ project "was a prevailing wage rate job" he was required to complete daily time sheets to the general contractor. The timesheets, attached as exhibit A to the summary judgment motion, described the work performed by the Portola crew. He stated Portola's role in installing the fall protection cable system is reflected in his written daily reports to the general contractor.

For example, on the first day of the project (February 5), the report stated the crew "welded on pickets and cable for safety tie off point." Seieroe explained, "This means that we installed the vertical posts on the [second] floor of the structure and strung the cable between the posts so that we [could] safely tie ourselves to the cable while we [were] doing our work . . . ."

Seieroe stated that three days later the crew installed vertical posts, called pickets, and strung cable. The February 8, 2007, report reflects this fact, stating, "[W]elded pickets around north end of building [and] strung cable . . . ." Seieroe remembered that day he personally put in cable between the vertical posts on the north end of the building.

Seieroe declared Portola "had no responsibility for installing, constructing, designing or furnishing any labor or materials that had anything to do with a temporary rebar guard rail system on the BEQ project for either ourselves or for any other trades . . . ." He explained Portola installed temporary safety rail systems made of cable. He stated, "In fact, after the metal decking was installed, we removed our temporary catenary yo-yo cable which is confirmed in my daily report of February 14, 2007[,] which states, '*removed cable at pickets*.'" And the following day, the reports reflected that Portola removed the vertical posts used to tie the yo-yo cable. The catenary cable fall protection system was not needed after the decking was installed and they were leaving the project that day (February 15).

Seieroe explained the reason why Portola would not have ever installed a guard rail system made of rebar. He stated, "It does not make sense for us to install a

rebar guard rail system because it would not be safe for us to tie off to a horizontal piece of rebar that is temporarily tied or tac welded to a vertical post while we are installing metal decking. Moreover, it would not be an efficient use of our time to install a rebar guard rail system either since it takes so much more time to weld a horizontal piece of rebar to vertical posts than it does to string cable, which is stronger, sturdier[,] and safer than a piece of rebar that is temporarily tied to a vertical post."

Portola's work with rebar was limited to "attach[ing it] through the deck to the top of the soleplate that separated the floors of the building where rebar extended vertically so that the masons could continue with the rebar support of their block wall above the soleplate for the wall above." Seieroe repeated Portola "did not use rebar to install, weld, tie or otherwise construct a rebar guard rail on the BEQ project."

Seieroe recognized Greg was injured on March 14, 2007, after falling from the second floor on the north side of the BEQ project. Seieroe stated he understood Greg climbed between two horizontal rebar rails to access a ladder but the rebar rail failed as he held it in his hands. Seieroe emphasized Portola was not on the job site that day and his crew had left the area one month prior to the incident. Moreover, while Portola was on the job site, they did not construct a rebar guard rail system. When Portola's crew returned to the BEQ project two weeks after Greg's accident, Seieroe claimed nobody mentioned the incident to him. He stated, "Had anybody truly believed that we installed the temporary rebar guard rail system that failed . . . then at a minimum, the general contractor would have immediately come to tell me about it to repair it and to reprimand or admonish us. However, we were never asked to repair a failed rebar safety rail, we were never admonished by anyone, including the general contractor." Seieroe claimed he did not learn about the accident until Greg filed his lawsuit a few years later.

Portola also submitted Seieroe's deposition transcript. During his deposition, Seieroe stated that when Portola returned to the BEQ job site the temporary guard rail he helped install had been replaced by a permanent guard rail. He did not

know who installed it. Examining photographs of the permanent guard rail, Seieroe noticed the cable was replaced with horizontal rebar rails and there were pickets missing. He said the pickets were "not in the place where they were put." Specifically, one picket in photograph number RQ0003 was missing "on the right." (We note the photographs are not part of the record on appeal.) Seieroe stated he had been at other job sites where the temporary guard rail system had been removed and rebar put in its place.

Portola also cited to the deposition testimony of Kevin Soares, the site safety officer working for RQ Construction. Soares stated he inspected the safety rail every day. Soares stated he did not remember seeing Portola's workers putting in the horizontal rebar between the posts. He only recalled seeing Portola's welders installing the vertical posts. He also did not notice a vertical post was missing. He stated that if he had seen the post was missing, he would have stopped work on the job site. He agreed if the post was missing the horizontal rebar would not be connected to anything, creating an unsafe condition.

James Negrete (James)[2] worked for the masonry subcontractor. One of his responsibilities was to walk around the job site each morning, looking at the scaffold to make sure it was safe for his workers "to go up and work." He stated his primary responsibility was for the safety of his workers on the job site. He stated he worked on the job site every day, reporting to David and Mike Trumbo. After Greg's accident, James inspected the ladder. He stated the ladder had been used by masonry subcontractor workers during the job but it had broken the day before the accident due to a dent on one of the steps. It was red-tagged and taken out of service. He recalled they had borrowed the ladder from RQ Construction.

James stated that sometimes the safety rebar rail is damaged or bent when workers load block onto the second floor. Usually, the masonry workers will bend it

[2] We refer to James Negrete by his first name for the sake of clarity and to avoid confusion with another witness, his father, David Negrete, Sr. (David).

back or switch it out. They could "butterfly tie it" to the vertical post, which involved the use of a "tie wire." James stated this methodology was approved by RQ construction's superintendent. He recalled there was one safety rail on the project that was hit by something and bent. He stated, "[W]e just took it off and put a brand-new one on."

Portola submitted a portion of Bruce Roger Denney's deposition transcript. He was the project's quality control manager. He stated it appeared the rebar may have been cut when the "terminal post" was removed. He added, "I would probably suspect that post had been removed no later than the previous day." He believed the terminal post was removed to allow erection of a wall.

Denney reviewed a change order, dated February 21, issued by RQ Construction to Quality, requesting the installation of a handrail system on the second floor. Denney explained the order asked Quality to provide all labor and materials necessary to "install a rebar guard rail system at the second floor deck of the BEQ." The change order was issued after Portola left the job site on February 15. Denney admitted he did not know exactly where on the second floor Quality installed the rebar guard rail.

In his deposition, Denney stated RQ Construction "used their own fall protection" system when they poured concrete on the second floor. He also reviewed a daily report, prepared by RQ Construction on February 20, 2007. The report stated, "Deck signed off" and "for pour on [February 22, 2007]." Denney understood this to mean the following: "[T]hey verified that all the puddle welding had been accepted by an inspector, so, . . . they're good to go. It could also mean that the rebar [reinforcement for the concrete] is signed off for--and ha[d] been accepted . . . ." Denney testified RQ construction spent several days pouring concrete onto the second floor deck after Portola left the job site and before Greg's accident.

In support of its motion, Portola also included the deposition transcript of Jack Timothy Pitner, vice president of Quality. Pitner explained typically Quality was hired by general contractors to install rebar. He stated the company does not usually

install handrails because "[t]hat's always something that's installed for us." However, he acknowledged, "But on this project we were asked [by the general contractor] to install some handrail on, I believe it was, the second floor."

Pitner explained that to determine when Quality performed the work requested by the change order he would refer to "backup paperwork" called a "field work authorization" that was signed by Quality's foreman to verify the additional work was completed. After reading the field work authorization (FWA), Pitner said the workers "tied rebar for the handrail system." He explained, "My assumption would have to be that there was masonry walls and there was vertical dowels coming out of the masonry walls and they asked us to tie bars horizontally onto those masonry dowels." He stated the "typical application" would be to "tie rebar to rebar . . . [s]o I'm going to make the assumption there was masonry bar coming up and that it was a masonry building and that we tied a handrail onto" using "tire wire." Pitner also assumed Quality's guard rail system would have been installed before the concrete pour for safety reasons. He added Quality had installed between two to six guard rails over the past five years on other projects. He recalled typically the guard rails were not permanent and would be removed by the masonry trade when it was time to build the block walls. He explained this was because Quality would use the masons' vertical posts to attach the rebar rails. Although Pitner had no independent recollection of the handrail installation, he opined his workers were well trained and would have tied rebar to rebar and not tied rebar to steel posts. He would not recommend tying rebar to steel posts, stating, "We tie rebar to rebar. The tie wire that we use, for the most part, really only works with rebar because of the bumps on the rebar. It allows them to stick together without moving or sliding. If you were to tie to something smooth, you can only get the wire so tight. And at some point in time, it's going to slip."

Based on the evidence gathered in discovery, and submitted in support of its motion, Portola asserted the incident was caused by the removal of a vertical post the

day before or the morning of Greg's fall. It alleged the facts proved the following: (1) its temporary perimeter safety rail was in a safe condition before Greg's accident; (2) the horizontal cable rails were replaced with rebar by someone else; and (3) the missing vertical post rendered the rebar rail to be an unsafe and dangerous condition. Had the project's safety officer (Soares) observed the missing post, he would have stopped work on the project to get it repaired. Portola theorized the post was likely removed by the masons, framers, or the general contractor to build a wall or pour concrete on the second floor deck.

We conclude the above evidence was sufficient to establish Portola did not install the rebar railing that became dislodged and caused Greg's fall. Consequently, the burden shifted to Greg to show this was a disputed material issue of fact. As we will now explain, he failed to do so.

In his separate statement, Greg, in response to Portola's assertion it installed cable railing, asserted there was evidence to the contrary. Specifically, Greg claimed his evidence would show, "There never existed a cable rail perimeter safety rail system on this job site. The rebar safety rail was the only perimeter safety rail system for the entire job site. This is the safety rail system which Portola left in place." To support this assertion, Greg referred to portions of seven different depositions.

First, Greg contends Soares testified Portola installed the rebar safety railing that broke off in his hand. He misconstrues the testimony. It must be read in context. When counsel asked the safety director if he recalled seeing Portola installing rebar on the second floor, he replied, "Posts, guard rail system, I did actually see them put it in. I don't remember. Does that mean that they weren't there, no. But I don't remember being there." In another section of his deposition, Soares confirmed he saw Portola's crew installing the vertical posts but he did not see who installed the horizontal rebar rails. In summary, Soares's deposition sheds no light on who was responsible for installing the horizontal rebar rails and offers no reason to doubt Portola's evidence it

installed horizontal cable rails that were later replaced by someone else. Soares' deposition testimony simply confirms Portola's evidence it installed the vertical posts.

Second, Greg cites to a portion of Charles Taylor's deposition. He was the project superintendent. In his deposition, Taylor was asked who was responsible "for putting up the safety rail that existed at the time of the accident" and Taylor replied, "Portola." In his briefing, Greg does not mention there were several objections made to this question during the deposition. Opposing counsel argued the question was vague and ambiguous because there was more than one safety rail. Was Taylor referring to the horizontal or vertical railing, and was he referring to safety railing other than the one surrounding the ladder? More importantly, the trial court sustained Portola's written objection to admission of Taylor's deposition testimony. Portola argued, and the court agreed, the testimony lacked foundation and was vague as to time, location, and subject matter. Greg does not challenge this evidentiary ruling on appeal. We conclude Taylor's ambiguous statement cannot be used as evidence to support Greg's theory Portola installed the horizontal rebar rails or that there never existed a horizontal cable rail system.

Third, Greg contends one of the masonry subcontractors, Erik Mikel, remembered Portola installed the rebar railing. This misstates the testimony. Mikel was asked, "Since you were out there from basically the ground level going up, did you see the safety railing installed on the second level?" He replied, "Yes." When asked who installed it, he could only offer an educated guess. Mikel stated, "That I can't be too sure about. It was either the--there's--the iron workers were either in charge or the--no, it wouldn't be the rebar guys. It had to be the iron guys . . . because if they put the steel C channel up, which they did because they welded it onto the corrugated steel deck, that would mean that would have to be in charge of putting the safety rail up because we don't weld and [RQ construction] doesn't weld, and its two responsibilities."

"'An issue of fact can only be created by a conflict of evidence. It is not created by "speculation, conjecture, imagination or guess work." [Citation.] Further, an issue of fact is not raised by "cryptic, broadly phrased, and conclusory assertions" [citation], or mere possibilities [citation]. "Thus, while the court in determining a motion for summary judgment does not 'try' the case, the court is bound to consider the competency of the evidence presented." [Citation.]' [Citation.]" (*Brown*, *supra*, 171 Cal.App.4th at pp. 525-526.)

We conclude Mikel's testimony regarding his recollection of when the railing was installed supports Portola's motion rather than Gary's opposition. Mikel was asked, "Do you recall approximately how long prior to the accident that the perimeter safety rail had been in place?" He replied, "Well, the--let's see. I'd say a month, a month prior because as soon as they start decking, that's the first thing that's required. They have to put the steel C channel up and the safety rail off and then they deck . . . ." It is undisputed Portola left the job site one month before the accident, and thereafter Quality received a change order instructing its workers to install a rebar guard rail. It could reasonably be inferred Mikel's testimony related to the rebar safety rail Quality installed.

Finally, Gary contends Mikel's testimony established there was never a cable rail at this job site. We read Mikel's testimony as being ambiguous on this topic. When asked if he recalled seeing a guard rail made of cables, he stated, "No, I do not. [¶] . . . [¶] . . . Like I was telling him earlier, *I can't recall if it was cable or steel*, and then once I looked at the photos, it was obviously rebar welded to the C channel. I don't recall any cable up there." (Italics added.) Mikel admitted he could not personally recall what material was used and referred to a photograph to jog his memory. That Mikel can identify rebar welded to the vertical posts in a photograph taken after the incident does not serve to dispute Portola's claim its cable rails were replaced with rebar one month before the photograph was taken.

The fourth deposition was inadmissible. Joseph Greer stated he observed the construction of a perimeter safety railing on the second floor. He recalled, "It was welded on there." However, Greer admitted he did not know "who it was that erected or constructed the safety rail on the second floor." After being shown two photographs of the accident site, Greer stated, "I know it was rebar all the way around it, which was very unusual to me because I've never seen rebar used as handrails. It's usually cable, and they had rebar welded on, which I've never seen on a job before, that type of system used as a guard rail. So that's the only reason why I do remember what the guard rail was made of." Later in his testimony, Greer stated he did not recall seeing a cable system for the perimeter rail and never saw anybody remove cable from the job. He stated he was continually on the job site approximately two to four months before the day Greg fell. Portola objected to this evidence on the grounds it was taken from a rough draft deposition transcript. (Code Civ. Proc., § 2025.540, subd. (b).) In addition, the testimony referred to a photograph that was not produced or authenticated, violating Evidence Code sections 1400 and 1401. Portola also argued the evidence was vague as to time, location, and subject matter.

Portola is right, the evidence was inadmissible. Code of Civil Procedure section 2025.540, subdivision (a), requires the deposition officer to "certify on the transcript of the deposition, or in a writing accompanying an audio or video record of deposition testimony, as described in [s]ection 2025.530, that the deponent was duly sworn and that the transcript or recording is a true record of the testimony given." Therefore, "When prepared as a rough draft transcript, the transcript of the deposition may not be certified and *may not be used, cited, or transcribed as the certified transcript of the deposition proceedings.* The rough draft transcript may not be cited or used in any way or at any time to rebut or contradict the certified transcript of deposition proceedings as provided by the deposition officer." (Code Civ. Proc., § 2025.540, subd. (b), italics added.) In his briefing on appeal, Greg does not suggest this statute does not apply to

Greer's rough draft transcript. He does not offer any argument in support of its admissibility. This evidence cannot be used to raise a triable issue of fact.

The fifth deposition is Greg's. When he was asked, "Are you aware of any safety rails that were removed from that second floor and then replaced with a different type of rail prior to your incident?" He replied, "No." He also did not recall seeing a cable rail. He was certain the horizontal rails were made of rebar and he was holding a rebar railing when he fell. However, this testimony does not prove that there never existed a cable rail perimeter system. Greg's statements are vague as to time and location. It is unknown if Greg was working at the same time Portola initially installed the cable railing or if he arrived after Portola left the job site and when Portola claims the cable was replaced with rebar.

Similarly, the sixth deposition testimony, given by Roger Denney, the Quality Control Manager for the general contractor, was vague and related to a photograph that is not included in our record. In his deposition, the following exchange occurred:

Question: "It doesn't look as though it's depicted in any of the other photographs.

Denney: "You can almost infer it's still there or is there, again, by the fact this rebar is not sagging. But that's not substantive enough evidence I believe.

Question: "Okay. [¶] To your recollection, was it always rebar that was running horizontal? Or at any time did you see cable railing in the area depicted at the top of the ladder in [p]icture number 5?

Denney: "I do not recall it being anything other than what is shown.

Question: "At any point?

Denney: "Not in this location."

Denney was also asked the following question: "Was there a particular subcontractor on this job that installed temporary fall protection?" He replied, "A

particular one?" One of the parties objected the question was vague and ambiguous because it was unclear if the question related to who was hired for the job or who installed the protection system. Denney stated, "Yeah, It does sound a little ambiguous. The fall protection that we have been speaking of was -- I believe it was exclusively installed by Portola."

The above testimony does not support Greg's assertion there *never existed* a cable rail system on this job site. Denney indicated cable was installed at some locations. Denney's comment there is rebar shown in the photograph does not assist Greg because the statement has no context without knowing what photograph Denney is referring to and when it was taken. Denney's testimony does not prove Portola installed rebar horizontal railings around the ladder. It simply confirms the fact RQ Construction hired Portola to install a fall protection system. Portola claims the cable railings were switched by a change order after it left the job site, and Denney's testimony does not cast doubt on the evidence proving this fact.

The last deposition on this issue was from David, one of the masonry subcontractor supervisors. He agreed with the statement he had worked on other construction projects where the perimeter safety rail consisted of vertical posts and horizontal braided cable. Counsel asked him, "Do you recall any safety rail like that on the second floor of the barracks building . . . ?" He replied "No." He admitted that generally when cable is installed, he has to cut it to perform his masonry work. But when asked if he remembered cutting cable on the BEQ project to allow Frazier Masonry to do its work, he replied, "No." He then added, "We don't cut cables." And he explained, "We go to the general contractor, and they decide what to do." The testimony is vague as to time and place. It is unclear if David was present on the second floor when Portola installed the cable railing or if he arrived after it was replaced. The testimony does not prove Greg's theory there never existed a cable rail system on the second floor of the project.

Because Greg failed to satisfy his burden of proving Portola installed the rebar railing, we need not address Greg's second claimed disputed fact, i.e., the missing vertical post may not have been the cause of the accident. Based on the above evidence, we conclude summary judgment was properly granted.

C. Quality's Motion for Summary Judgment

Quality's motion essentially included the same background facts as Portola's. Its theory was Gary could not establish a causal link between Quality's work on the project and the injury-causing incident. It provided facts establishing the following: (1) It did not perform work at the location of the incident; (2) it installed a rebar guard rail on February 12, 2007, which was 21 days prior to the day of the incident; and (3) Quality does not weld and Greg fell after the horizontal rebar piece he was holding, which had been *welded* to vertical steel post, became detached. Quality presented evidence its crew was not trained to weld and did not have the necessary tools to weld rebar to the vertical rails. Quality's vice president testified the crew was trained to connect rebar to other rebar using tie-wire.

In its opposition, Greg stated there was conflicting evidence on how the rebar was attached to the vertical post. Although Greg and his coworker recalled the rebar was welded, Greg maintains there were other witnesses who believed "it was simply threaded through holes in the angle iron."

To support this contention, Greg cited two pages of Soares's deposition. On page 211 of the deposition, Soares stated he was not required to take photographs of the construction site and did not recall taking photos before the incident. The following exchange then occurred:

Question: "When you took the photographs after the incident, how was the horizontal rail affixed to the vertical angle iron?

Counsel: "Objection. Asked and answered.

Counsel: "Join.

Counsel: "If you can tell.

Soares: "I don't recall."

Contrary to Greg's contention, Soares's deposition does not establish a triable issue of material fact. Soares testified he could not recall how the horizontal rail was affixed. Counsel's question suggesting the rail was affixed to a vertical angle iron is certainly not evidence the rail was in fact fastened rather than welded.

Greg also cited to page 302 of the deposition. The following exchange occurred after Soares stated he did not see cable but recalled seeing rebar was used for the guard rail:

Question: "Do you remember how this horizontal rebar was affixed to the angle iron?

Soares: "No, I don't remember. I don't recall.

Question: "Do you know if it was welded?

Counsel: "Objection. Asked and answered.

Soares: "I don't know."

This portion of the deposition also does not raise a triable issue of fact or refute evidence the rebar was welded. Soares's lack of memory on this issue does not cast any doubt on the witnesses who unequivocally remember it was welded. Among those witnesses were Greg and his coworker Amaya.

As additional support for Greg's theory there was a disputed fact about whether the rebar that dislodged in his hand had been welded, Greg submitted a portion of Pitner's deposition. The following exchange occurred:

Question: "Well, this guard rail that you see in these photographs here, that appears to be, anyway, partly rebar and part steel verticals; correct?

Pitner: "Uh- huh.

Question: "Yes?

Pitner: "Yes.

Question: "And it appears to you, from the photographs, that the horizontal rebar was not tied with wire to the steel. [¶] That's also correct; right?

Pitner: "That's also correct.

Question: "It would thereby indicate that if it was affixed somehow to that, it was probably welded? Would that be a reasonable assumption?

Pitner: "That would be a reasonable assumption. You have the good pictures. It looks to me like--and I'm speculating of course. It almost looks to me like there was a hole in the post and they stuck the bar in it."

To the extent this speculative testimony is admissible, it suggests the horizontal rebar rail was "probably welded." This inference does not support Greg's claim the rail was tied or threaded. "'An issue of fact can only be created by a conflict of evidence. It is not created by "speculation, conjecture, imagination or guess work." [Citation.] Further, an issue of fact is not raised by "cryptic, broadly phrased, and conclusory assertions" [citation], or mere possibilities [citation].'" (*Brown, supra,* 171 Cal.App.4th at p. 525.) Pitner admits these answers were based on assumptions and speculation, not personal knowledge.

Similarly, the last deposition Greg submitted to prove a jury must decide how the rebar was attached is inadequate. James was asked, "I know you've had the benefit and opportunity now to look at the photographs. I'm just trying to figure out what you remember when you were up there on that second floor untying that ladder to that piece of rebar. [¶] Looking back, do you have any sort of independent recollection of looking to see if the horizontal rebar that was attached to those vertical posts, if they were welded and/or threaded through the holes in the post and/or attached with tie wire. Do you--as you sit here today, do you have any independent recollection of making any sort of observation of the way that was attached when you were there untying that ladder?" He replied "No." Counsel immediately re-asked the question as follows: "So as you sit here today, you have no idea how that horizontal piece of rebar was attached to the

vertical post; correct?" James replied, "No. Correct." This testimony is clear. James had no independent recollection of how the rebar was attached. It sheds no light on the issue and certainly should not have been cited as evidence creating a dispute of material fact.

We note briefly that Quality's evidence establishing the rebar was welded was unequivocal. In response to form interrogatories, Greg asserted the rebar was "[w]elded, not tied." This claim was supported by Amaya's deposition transcript. Amaya testified he personally examined the piece of rebar that became detached in Greg's hand after the fall. He stated, "We saw in disgust the weld that broke and it was a tack weld." He elaborated, "[The tack weld] was on one of the ends, if not both. I remember one that broke." When questioned more about the weld, Amaya stated he clearly remembered the broken weld on one side and could not "honestly remember what the other side had." Amaya, stated he was a certified welder and he could tell the track well "was freshly broken" because "it was fresh metal at the point where it apparently broke and the rest of the weld had rust." Amaya stated he inspected the guard rail immediately after the incident by looking up and seeing the remaining rebar around the ladder was also tack welded.

Quality's evidence establishing the rebar was welded to the vertical posts was only one part of the liability claim. It relates to the primary issue of whether Quality could be held liable for negligence for welding the rebar railing. Citing Pitner's deposition, Quality asserted its workers would not weld rebar and they were trained to connect rebar using tie-wire. Greg cites to a portion of Pitner's deposition testimony to prove this was a disputed fact because Quality's "employees had welding torches which they regularly used on job sites."

Greg cites to eight lines on page 101 of the transcript. We find reading the quote in context is more helpful and more accurately reflects the speaker's intent. On page 99, Pitner testified his workers would not undertake a job they were not trained to

do, and if they had hypothetically been asked to weld the rebar they would not have complied with the request. When asked why, Pitner replied, "Well, for one, I think they all know that that would be severely frowned upon by the field superintendent, meaning it's out of our scope of work. Typically, we don't necessarily like installing handrail to begin with. It becomes--it makes sense in the application where you have rebar to rebar because there's not going to be anybody that's quicker or probably more efficient at tying rebar to rebar. That would be like asking us to do something that's out of our scope of work. And our guys are--everybody is pretty much well trained to . . . stay within our scope. If somebody came up and said, hey, we want all you guys to shove all these [two-by-fours] for this handrail system in these vertical posts because you're up there first, our guys would just say no."

Next, on page 100, counsel asked Pitner if his workers used welding torches on any job sites. He stated, "For cutting, yes. We cut rebar with a torch. For welding, no." Counsel then asked Pitner about the wording of the change order, assigning Quality the job of providing all labor and materials necessary to install a rebar guard rail system "as directed by" the general contractor's site superintendent and safety officer. Counsel noted the order did not specify how the rebar should be installed. Pitner agreed the change order did not specify the method of installation. Counsel asked there was any possibility Quality's workers would weld the rebar if they were given a torch or told by the general contractor to weld the rebar. On page 101, Pitner responded, "Because it's outside our scope of work. It's something we're not trained in. It's something we don't do. [¶] In most construction, each different facet of construction, be it a plumber, be it a concrete guy, everybody is pretty specific to their scope of work. Carpenter wouldn't want to see us installing wood. It would offend them. Just like we don't want to see a guy who installs wood putting in rebar."

What counsel asks Pitner next is the portion of the transcript Greg relies on to dispute Quality's evidence it does not weld rebar. Counsel told Pitner they were not

discussing carpenters installing rebar because Quality put up a partial rebar guard rail and its workers use torches. Pitner stated, "But not for welding. We don't have even the materials. If we have a torch--for one, I don't necessarily think you can use and torch and weld in that application. I'm not exactly sure. I know there's ways to weld using a torch, but I think that's a lighter duty type weld. Most welding is done with a welding machine, not necessarily with a torch. Our torches only come with a tip to cut off rebar. That's all we use them for."

When read in context, this evidence shows Quality used torches, but these tools came with parts exclusively to cut rebar. This testimony does not support Greg's claim Quality's workers used "welding torches" or that they possessed the necessary tools to weld rebar. Nor does this testimony dispute Quality's evidence proving its workers installed its guard rail by tying it to other rebar.

D. Res Ipsa Loquitur

Greg asserts the doctrine of res ipsa loquitur precludes summary judgment in Portola's and Quality's favor. He argues there are four defendants who all deny wrongdoing and he should not be placed in the unfair position of having to point to which defendant caused the harm. He contends, "Falling from a ladder because a rebar guard rail system fails and become detached is not the type of injury which ordinarily occurs in the absence of negligence. The defendants named in this action had exclusive control over the instrumentality—the perimeter safety rail system. Indeed, compelling documentary evidence indicates that Quality and/or Portola installed the defective guard rail. [¶] [Greg] has demonstrated that a triable issue of fact exists as to Quality and Portola's responsibility for the rebar rail. It cannot be said that [Greg] is responsible for the failure of the perimeter safety rail. [¶] The doctrine of res ispa loquitur places the burden on defendants (respondents herein) to present evidence which would support a finding that it was not negligent or that any negligence on its part was not a proximate cause of [Greg's] fall. After they have done so, it is for the *finder of fact* to determine

which defendant or defendants are responsible for [Greg's] injuries." This is the extent of Greg's argument on this issue.

"The doctrine of res ipsa loquitur is too familiar to warrant a lengthy explanation. In brief, certain kinds of accidents are so likely to have been caused by the defendant's negligence that one may fairly say 'the thing speaks for itself.' The Latin equivalent of this phrase, 'res ipsa loquitur,' was first applied to a barrel of flour that rolled out of the window of the defendant's warehouse onto the plaintiff. [Citation.] As later courts repeated the phrase, it evolved into the name of a rule for determining whether circumstantial evidence of negligence is sufficient. The procedural and evidentiary consequences that follow from the conclusion that an accident 'speaks for itself' vary from jurisdiction to jurisdiction." (*Brown v. Poway Unified School District* (1993) 4 Cal.4th 820, 825 (*Poway*).)

"In California, the doctrine of res ipsa loquitur is defined by statute as 'a presumption affecting the burden of producing evidence.' (Evid. Code, § 646, subd. (b).) The presumption arises when the evidence satisfies three conditions: '"(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff."' [Citation.] A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. (Evid. Code, § 604; see also *id*., § 646, subd. (c).) The presumed fact, in this context, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant . . . .' [Citations.] If the defendant introduces 'evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,' the trier of fact determines whether defendant was negligent without regard

to the presumption, simply by weighing the evidence. [Citations.]" (*Poway, supra,* 4 Cal.4th at pp. 825-826.)

Greg's argument speaks to the first and third conditions of res ipsa loquitor. However, the doctrine also requires that the instrumentality be "within the exclusive control of the defendant." (*Poway, supra*, 4 Cal.4th at pp. 825-826.) As Greg stated in his opening brief, several defendants named in the action *shared control* over the instrumentality—the perimeter safety rail system. In their motions for summary judgment, Quality and Portola presented evidence proving they played no part in welding rebar to vertical posts. Their evidence established they lacked *exclusive* control over the guard rail safety system on the project. Quality established it did not weld any part of the guard rail it installed. Portola established it did not use rebar in the guard rail it installed. The evidence suggests the protection system for the workers was constantly evolving as each trade completed a part of the project. Moreover, these two subcontractors were not the only trades working on the project, and they each presented evidence they left the job site approximately one month prior to Greg's fall. For these reasons, the dangerous condition does not "speak for itself" because the rebar could have been negligently tack welded by another trade or the general contractor. The guard rail could have been changed after Quality and Portola finished their guard rails and left the premises. The mere fact Greg fell from the second floor does not automatically invoke the doctrine because there is no evidence showing Quality's or Portola's employees created the allegedly dangerous condition. Simply stated, "[T]he evidence in this case still does not support the necessary conclusion that '*it is more probable than not* that the injury was the result of the *defendant's* negligence'" (*id.* at p. 828), especially when it is alleged four defendants could be at fault.

As for Greg's assertion it is unfair to make him prove who the liable party is, we need not say much other than we disagree with Greg's theory the four defendants, as a matter of public policy, had the burden to identify the culpable party. This argument

is based on the faulty assumption the defendants "are in a far better position to offer evidence to determine which one caused the injury." This is simply untrue. Both Quality's and Portola's workers left the job site several weeks before the incident. They did not witness the incident and were not present that day to investigate the cause. Portola's foreman commented he was unaware of the incident until Greg filed a lawsuit years later.

The case Greg relies upon to support his theory we must shift the burden of proof is *Summers v. Tice* (1948) 33 Cal.2d 80. In that case, two men quail hunting fired shotguns simultaneously and injured plaintiff, who could not ascertain which of the shots hit him. Our Supreme Court held both of the defendants were negligent and that in considering "the relative position of the parties and the results that would flow if [the] plaintiff was required to pin the injury on one of the defendants only," the burden of proof with respect to who caused the injury should be shifted to the defendants. (*Id* at p. 86.) "[I]t should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm." (*Ibid*.)

The case is inapt here. In the *Summers* case, there was no question as to the fact one of the two hunters caused the injury. The issue was the lack of proof regarding which of the two was at fault. The court determined to shift the burden of proof to defendants because it was absolutely clear the injury was caused by one of the men. In the case before us, the exact cause of Greg's injury was unclear. The parties offered different theories, i.e., deficient welding or removal of a vertical post. Additionally, as discussed above the court was not presented evidence showing that either Quality or Portola were negligent in installing their guard rails one month before the incident. No one suggested these two trades acted in concert with each other or with the remaining defendants in this action (the trial court denied summary judgment motions filed by Frazier and RQ Construction). Unlike the *Summers* case, it is not clear all four

defendants were negligent. With so many potential wrongdoers and lack of certainty regarding causation, we conclude it would be unfair to excuse Greg from his burden of proving duty, breach, and causation before prevailing in his negligence action.

III

The judgments of dismissal entered in favor of Quality and Portola are affirmed. Respondents shall recover their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.